PUBLIC PROSECUTOR

v.

A. JUVENILE

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[JUVENILE REVISION NO. 43-20 OF 1990]
22 FEBRUARY 1990

CRIMINAL PROCEDURE: *Revisionary powers of High Court - Juvenile Court - Allegations of illegality - Guidelines for juvenile trials - Finding of guilt - Caning by magistrate personally - Section 293 of the Criminal Procedure Code - Conviction in Criminal Court as opposed to conviction in Juvenile Court - Interpretation - Section 4(5) of the Juvenile Courts Act 1947.*

In this particular case, a youthful offender on being found guilty, was caned eight times by the Magistrate personally. The High Court in exercising its revisionary powers looked into allegations contained in an undated and unsigned letter sent to the Court.

In looking into the allegations, the Court was required to look into the interpretation of the Juvenile Courts Act 1947 and also its relation to s. 293 of the Criminal Procedure Code.

Held:

[1] Section 293 of the Criminal Procedure Code cannot be applied to a Juvenile Court case. On the other hand, a Criminal Court can apply the provisions of the Juvenile Courts Act 1947 in cases where a youthful offender has been convicted.

[2] The Courts must be empowered by law which is spelled out in clear language.

[3] It was observed by the Court that even if a youthful offender is convicted in a open Criminal Court, and if the magistrate is to carry out the order of caning himself, then he would have a stake in the outcome of the case and therefore would not be impartial.

[4] A Judge cannot be the prosecutor, Judge and executioner at the same time in a case.

[5] Nowhere in the Juvenile Court Act is there any provision of caning, or is there any provision which permits a magistrate to carry out the caning personally.

[Order accordingly.]

Legislation referred to:
Criminal Procedure Code, ss. 293, (i)(c)
Juvenile Courts Act 1947, ss. 3A(5), 4, (1), (5), 12(1), (2), (3)

JUDGMENT

Mustapha Hussain J:

This is a Juvenile Revision initially called upon by this High Court on receipt of an undated and unsigned letter on 15 February 1990. Normally unsigned letters are not entertained but since the contents made allegations of illegality, where the punishment imposed, and there are a few more to be imposed, is *irreversible,* this Court is bound and justified in calling for the file from the trial Court to look into the allegations.

The magistrate himself personally caned the juvenile eight times in his chambers on 14 February 1990 at the Rembau Magistrate's Court. The magistrate too by his letter dated 17 February 1990 had asked for revision of the order he had made.

Juvenile cases are dealt with under the provisions of the Juvenile Courts Act 1947 (JCA for short). The JCA specifically provides for a separate Court known as a Juvenile Court (s. 4(1)) away from the ordinary open Court (i.e., open to the public) and usually the Juvenile Court sits in chambers (s. 3A(5)) - closed to all except the juvenile, the parents or guardians, the prosecuting officer, the two advisers and of course the magistrate (who should be a first class magistrate). If the juvenile does not admit to the charge and claims trial, then the usual witnesses involved will have to give the usual evidence. The juvenile can be represented by Counsel.

The two advisers' function is to inform and advise the magistrate on matters affecting the punishment and other treatment to be imposed against the juvenile in the event the Juvenile Court makes a finding of guilt (s. 4).

The words **"conviction"** and **"sentence"** cannot be used as far as juveniles are concerned. Instead the words used are **"finding of guilt"** and **"order made upon finding of guilt"** (see s. 12(3)).

Only when the Juvenile Court is satisfied that an offence **has been proved** the Court has the power to impose the various forms of orders on the juvenile and/or his parents or guardians, all set out under ss. 12(1) and (2).

Nowhere in the JCA is there any provision of caning to be carried out nor by the magistrate personally.

This juvenile whose case is under revision now, was caned eight times by the magistrate personally. The magistrate was exercising his power under s. 293 of the Criminal Procedure Code (CPC) according to the notes of evidence.

Section 293 of the Criminal Procedure reads as follows:

> 293(i) When any youthful offender is **convicted before any Criminal Court** of any offence punishable by fine or imprisonment, such Court may **instead of awarding any term of imprisonment in default of payment of the fine or passing a sentence of imprisonment**:
>
> (a) order ...
>
> (b) ...
>
> (c) order such offender, if a male, to be whipped with not more than ten strokes of a light cane or rattan within the Court premises and in the presence if, he desires to be present, of the parent or guardian of such offender; or
>
> (d) deal with such offender in the manner provided by the Juvenile Courts Act 1947.

It is quite plain and obvious, this form of punishment of whipping or caning under s. 293(i)(c) of Criminal Procedure Code is to be made on a youthful offender who has been **convicted before any Criminal Court**. The words **"convicted"** and **"Criminal Court"** are quite simple, clear and incapable of being manoeuvred to include any other meaning. Nor is there room at all for interpretation. A glance at the CPC and compare it with the JCA, it will clearly show the obvious difference between an open Criminal Court and that of the Juvenile Court. Penal terms have to be strictly construed and interpreted and we cannot import something which is not there.

Our juvenile the subject of this revision was not **convicted** and the Court before which he was tried was not a **Criminal Court**.

Section 293 of the Criminal Procedure Code envisages a situation where a juvenile is being charged together with an adult in an open Criminal Court and he is convicted of a charge, say of robbery. Even in this instance, there is no mention or provision for the magistrate taking upon himself, to execute the caning.

The saving provision of s. 4(5) of Juvenile Courts Act of applying the provisions of Criminal Procedure Code cannot be invoked as the Juvenile Courts Act did not modify or extend the applicability of s. 293 of the Criminal Procedure Code because the legislature had deliberately used the words "Criminal Court" and the word "convicted" in s. 293 of Criminal Procedure Code. If the words "or Juvenile Court" had been inserted after the words "Criminal Court" and the words "or finding of guilt" inserted after the word "convicted" in s. 293 of the Criminal Procedure Code then only can s. 293 of the Criminal Procedure Code be applicable, **provided there is also an amendment to the Juvenile Courts Act to include caning**.

It is the ruling of this High Court that s. 293 of the Criminal Procedure Code as it now stands cannot be applied to a Juvenile Court case. On the other hand a Criminal Court can apply the provisions of the Juvenile Courts Act in cases where a youthful offender has been convicted.

Sub-section (i)(d) of s. 293 of the Criminal Procedure Code would not have been legislated specifically for the Criminal Court to apply the provisions of Juvenile Courts Act if at all s. 293 of the Criminal Procedure Code itself was already applicable to cases before the Juvenile Court.

No doubt many of the boys nowadays are vicious, violent and criminally prone and they do deserve to be caned to inculcate some sense of discipline in them. But then the provisions for such caning must be spelled out in the law in clear language.

A Judge cannot be the prosecutor, Judge and executioner at the same time in a case. Only in rare cases of contempt of Court to protect the Court itself can a Judge be also the prosecutor in the case. **But never the executioner** and a Judge at the same time.

Even in cases where a youthful offender is convicted before a Criminal Court and if magistrate is to carry out the order of caning himself, then he would have a stake in the outcome of the case. He would then have the interest in the case. If he has this interest in the outcome of the case inevitably and invariably there will be a finding of guilt. Invariably and inevitably, there will follow the punishment of caning. He therefore cannot be said to be impartial. His findings and judgments in all cases involving juveniles will be observed by getting the offence proved at all costs and the sentence will always be caning and he himself carrying it out even in spite of the recommendation of the probation officer, as happened in the instant case which is subject of this revision.

Also found at [1990] 1 CLJ 968